When the alternative lies as it does in this case between supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives existing words of all meaning, the reasonable course seems to me to be to supply the omitted words. In such cases it has been said, I think rightly, that the Legislature "shows in one passage that it did not mean what its words signify in another; and a modification is therefore called for, and sanctioned beforehand as it were, by the author" — Maxwell on the Interpretation of Statute Law (6th ed.), p. 447. The opinion of Lord Chancellor Lyndhurst in the case of *Wainewright* ((1843) 1 Phillips 258, 65 R.R. 382) seems to me to be apposite and appropriate in this case. The Lord Chancellor when construing a section of the Fines and Recoveries Act of 1833 said — "There is, however, an omission in the 33rd section which it is proper to notice. The words are—'If any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be the protector of such settlement and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then His Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant or whose existence cannot be ascertained,' omitting the case of a person convicted of treason or felony. But I think that the omission must be supplied by implication, otherwise no effect can be given to the previous words 'if any person, protector of a settlement, shall be convicted of treason or felony.' Now these words cannot be struck out of the Act, and it is much more natural to supply the words 'in lieu of the person who shall be convicted' than to adopt a construction which would deprive the preceding words of all meaning."

It is true that in the case of *Underhill* v. *Longridge* ((1859) 29 L.J., C.L. 67) the Court declined to supply by implication certain words which were necessary to establish an offence created by the statute, the commission of which offence would have involved liability for a penalty. Lord Chief-Justice Cockburn did not explain in giving judgment the grounds of his opinion, but merely stated that the Court could not insert the necessary words; and that that was a matter for the Legislature. It seems clear, however, that the grounds of the judgment were that the defective statutory provision under consideration was penal in its character, and that to interpolate the omitted words would have brought the accused within the penal enactment. In Maxwell's treatise the decision is so explained — Maxwell on the Interpretation of Statute Law (6th ed.), p. 482 *et seq.*

The present case seems to me to fall under the principle of the decision in *Wainewright's* case. The Statute of 1920, although in one aspect it restricts the ordinary rights of individuals, is intended in that way to remedy grievances on the part of tenants incident to undue increases of rents and oppressive removals consequent on the abnormal conditions prevailing during and since the war, and, moreover, the provision of section 2 (6) has reference merely to the civil remedy applicable to the substantive rights conferred by the statute.

For the reasons which I have given I have reached the conclusion that on the sound construction of the statutory provisions applicable to this case the judgment of the Sheriff is final and conclusive, and that the appeal taken to this Court is incompetent.

The Court dismissed the appeal.

Counsel for the Pursuers and Respondents — Macmillan, K.C. — Crawford. Agents— Campbell & Smith, S.S.C.

Counsel for the Defender and Appellant —C. H. Brown, K.C. — Cooper. Agents— Mackenzie & Fortune, K.C.

Wednesday, February 22.

SECOND DIVISION.

[Lord Hunter, Ordinary.

GOW *v.* GLASGOW EDUCATION AUTHORITY.

Reparation — Negligence — Education Authority—Duty of Supervising Children —Blind Child Injured by Another while at Play—Liability of Education Authority for Lack of Supervision,

The father of a blind boy brought an action of damages against an education authority for personal injuries caused to his son while under the care of the defenders in a hostel provided by them. The boy was playing in a recreation room in the hostel along with other children, some of whom had sight, when another boy unexpectedly jumped upon his back and causing him to fall and break his arm. The pursuer averred that the defenders were in fault in respect that they had not provided a servant in the room to watch over the conduct of the children. The Court *dismissed* the action as irrelevant, *holding* that (1) the precaution desiderated by the pursuer was unreasonable, and (2) the absence of the precaution was not the cause of the accident, which was one unlikely to occur.

Observed per Lord Sands—"I do not think that any higher standard of precaution is incumbent upon the defenders than would be observed by a reasonable parent."

Andrew Gow, Glasgow, as tutor and administrator-in-law for his pupil son Donald, *pursuer*, brought an action of damages for personal injuries for £500 against the Education Authority of Glasgow, *defenders*.

The pursuer and the defenders averred, *inter alia*—"(Cond. 1) The pursuer has raised the present action as tutor and administrator-in-law for his pupil son Donald, aged 7 years. The said Donald Gow is blind and was during the month of February 1921 and also prior to that date

an inmate of a hostel for blind children called Woodburn House, Rutherglen, which is maintained by and is under the charge of the defenders. (*Ans.* 1) Admitted, subject to the explanation that the said Donald Gow is not totally blind. (Cond. 2) Early in 1920 pursuer was informed by the defenders that in terms of their statutory powers they arranged that the said Donald Gow should reside in Woodburn House for certain nights in each week so that they might there supervise his care and safety in company with other children similarly afflicted. Since the spring of 1920 Donald Gow has resided in the said hostel during each week from Monday until Friday. During the day-time he, along with other blind children, has been conveyed by one of the defenders' servants to Oatlands Public School for purposes of education. During the said days of the week he was entirely in the charge of the defenders in the said hostel where provision is made for inmates receiving board and attention suitable to their requirements. It has, however, for some time been the practice for a few children not afflicted with blindness also to be permitted by the defenders to reside in the said hostel. With reference to the averments in answer it is denied that the pursuer made the said application to the defenders on the ground of poverty or on any other ground. It is believed and averred that the action of the defenders in allowing normal children to consort with blind children was taken at the request of the Corporation of Glasgow. Admitted that the pursuer paid 5s. a-week towards the child's upkeep. *Quoad ultra* these averments are denied in so far as they do not coincide herewith. (*Ans.* 2) Denied that early in 1920 the pursuer was informed by the defenders that in terms of their statutory powers they required the said Donald Gow to reside in Woodburn House for certain nights in each week. *Quoad ultra* denied except in so far as coinciding with the following explanation. Explained that in terms of the Education of Blind and Deaf Mute Children (Scotland) Act 1890, the defenders are bound to provide for the elementary education, industrial training and boarding of a blind child between five and sixteen years of age whose parent is from poverty unable to pay for such. In December 1919 the pursuer pleaded inability from poverty to pay for the education and maintenance of the said Donald Gow and made application to the defenders to have the said child educated and maintained. The defenders, after making inquiry into the pursuer's circumstances, intimated to the pursuer on or about January 17th 1920, that they sanctioned the admission of the said child to Woodburn Hostel, and afterwards arranged that pursuer should contribute five shillings a week towards his child's upkeep. The child resided in Woodburn House from Monday until Friday in each week and was conveyed daily along with other children to the Wolseley Street Public School, Oatlands, Glasgow. The application from pursuer to defenders and copy of letter from defenders to pursuer, dated January 17th 1920, are produced herewith. Explained further that in some classes of the public schools and in the said hostel certain children not afflicted with blindness are allowed to consort with those who are, in order that the blind children may be familiarised with ordinary persons and thus helped in after life in their relations with the outside world. (Cond. 3) During the evenings on which the said Donald Gow resided in the hostel it was the defenders' practice to allow boys and girls resident there to enjoy recreation in one of the rooms of the hostel. On the evening of 22nd February 1921 the said Donald Gow was engaged in playing games in the room above referred to along with other children, some of whom were blind and others of whom had their full sight. On the said evening no servant of the defenders was left in charge of the said children. At about 6·30 on the said evening another boy named Alexander Smith jumped unexpectedly on to the back of the said Donald Gow, causing him to fall to the ground and he sustained serious injuries as after-mentioned. The averments in answer are denied in so far as they do not coincide herewith. (*Ans.* 3) Denied that no servant of the defenders was left in charge of the children and that the said Donald Gow sustained serious injuries. *Quoad ultra* admitted. Explained that the matron Miss Brown or one or more of her assistants is constantly moving about the rooms where the children are playing. The children in the course of their play move about the house. When the accident occurred Miss Brown was immediately outside the door of the room. (Cond. 4) The said injuries were due to the fault of the defenders, who had caused the said Donald Gow to be removed from his home for the purpose of being properly tended and safeguarded in the manner most suitable for blind children. It was the duty of the defenders to have made suitable and sufficient provision for such safeguarding at all times of the day and night. It was further their duty to have provided a servant or servants to supervise the conduct of the said children during their hours of play and recreation and in particular on the occasion in question. This duty was all the more incumbent in respect that they permitted children not afflicted with blindness and therefore more liable to boisterous games to remain in the same room during play as those afflicted with blindness. In this duty they culpably failed. It is well known to the defenders that children, and particularly those not afflicted as above, are prone to indulge in games involving violence, and that children afflicted by blindness are liable to be the victims of any misconduct or roughness of other children not so afflicted, and are unable to protect themselves from such violence and roughness. It was in order to provide against this and other similar contingencies that the defenders arranged for the removal of the said boy to the said hostel. They ought accordingly to have made arrangements for some servant or teacher to be present when the mixed children were at play in the said

room, and the children ought not to have been left without supervision. Had the defenders provided a servant or servants to watch over the conduct of the children in the said room on the said occasion, the said Donald Gow would not have sustained the forementioned injuries, as such servant would have been able to control the children and prevent the interference of one with another, and for their fault and negligence in not making such provision, or alternatively for that of those whom they have placed in the said hostel as superintendents in not making such provision, the defenders are responsible. (*Ans.* 4) Admitted that the defenders are bound to superintend the children. *Quoad ultra* denied."

The defenders pleaded, *inter alia*—"The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

The pursuer proposed the following issue —"Whether on or about 22nd February 1921, and at or in Woodburn House, Rutherglen, the pursuer's pupil son Donald sustained personal injury through the fault of the defenders, to his loss, injury, and damage."

On 15th October 1921 the Lord Ordinary (HUNTER) pronounced an interlocutor in which he sustained the first plea-in-law for the defenders, refused the proposed issue, and dismissed the action.

Opinion.—"In my opinion the pursuer's averments in this case are not relevant, and I should not be justified in allowing a jury trial.

"The case is an altogether exceptional one. The pursuer, who is the father of a blind boy, sues the Education Authority of Glasgow for damages in consequence of injuries sustained by his son. According to the Education of Blind and Deaf Mute Children (Scotland) Act 1890, the defenders are bound to provide for the elementary education, industrial training, and boarding of a blind child between five and sixteen years of age whose parent is from poverty unable to pay for such. The pursuer's child was cared for by the defenders, and it is said by the pursuer that he had to reside in a hostel under the charge of the defenders during each week from Monday until Friday. He avers that it is in accordance with the practice adopted by the defenders in the training of blind children that a few children not afflicted with blindness are permitted by the defenders to reside in the hostel. No suggestion was made that that course deliberately adopted by the Education Authority of Glasgow is an improper course for them to follow.

"On the evening of 22nd February 1921 the pursuer's child was engaged in playing games in a room in the hostel along with other children, some of whom were blind and others of whom had their full sight. It is averred that on that evening there was no servant of the defenders left in charge of the said children, and that about 6·30 on the said evening another boy named Alexander Smith jumped unexpectedly on to the back of the pursuer's child, causing him to fall to the ground, whereby he sustained serious injuries as after mentioned. The injuries, I understand, consisted principally in the fracture of an arm. For those injuries the pursuer seeks to make the defenders responsible. His counsel referred to the general principle of law — that a school board having charge of children must take adequate precautions to protect them against danger from defect in connection with the school board property or from the dangerous action of persons on the premises. The soundness of this proposition I do not think is doubted. Two illustrations of its application were given by pursuer's counsel in the cases of *Williams*, 10 T.L.R. 41, and *Cormack*, 16 R. 812. In the first of the two cases a schoolmaster was held guilty of negligence and liable for the consequences where he had left a bottle of phosphorus in such a place that a child was able to get hold of it and injure another child. In *Cormack's* case the school board was held liable because there was an insufficiently secured gate upon which some children were swinging and one of them received injuries. To my mind neither of these cases is in any way like to the present case. The averments of the pursuer are confined to the one averment, as I take it, that the defenders were negligent in not having some one in constant attendance upon the children when they were playing. No authority was cited to me in favour of that proposition as regards the duty of a school board who have to take charge of a number of children. It seems to me that it is a strong proposition to lay down that there is an invariable duty upon a school board, where two or three children, one or more of whom are blind, are playing together, to have some adult person in constant supervision of them, unless there is some reason on the part of the school board to anticipate danger from the children being together. It appears to me to be somewhat extravagant to argue that, because of the proneness of children to indulge in acts of playfulness, some special duty is imposed upon a school board authority in such circumstances.

"In the present case, however, I do not think it is necessary for me absolutely to determine that proposition one way or another because I do not think that the pursuer has relevantly connected the injury which his son sustained with the alleged act of negligence on the defenders' part. The pursuer says that one boy jumped unexpectedly on the back of his son causing him injury. I do not see how the circumstance that some one of mature age had been in the room would have prevented that; and I think it would be merely allowing a considerable waste of judicial time and expense to public authorities to allow this case to go to trial by jury. I therefore dismiss it."

The pursuer reclaimed, and argued—There was a general duty on the defenders to look after the children entrusted to them. The boy was blind, and since boys who had their sight were also in the room the defenders should have arranged for some one to be present in the room while the children were at play in order to supervise them. The defenders

should have anticipated that there might be rough play. The question of unexpectedness was a question of fact for the jury—*Williams* v. *Eady*, (1893) 10 T.L.R. 41; *Cormack* v. *School Board of Wick and Pulteneytown*, (1889) 16 R. 812, 26 S.L.R. 599, *per* Lord Justice-Clerk (Macdonald) at 16 R. 813, 26 S.L.R. 599; and *Taylor* v. *Glasgow Corporation*, 1921 S.C. 263, 58 S.L.R. 158, *affd.* (1921), 59 S.L.R. 14, were referred to.

Argued for the respondents—The pursuers were seeking to place upon the defenders the duty of having someone constantly in attendance. That was an unreasonable duty. Admittedly the defenders were liable in the duty of a reasonable parent, but the duty which the pursuers were seeking to place upon the defenders went beyond that. Moreover, the accident was unexpected, and there was no direct connection between it and the alleged breach of duty. *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, 45 S.L.R. 860, *per* Lord M'Laren at 1908 S.C. 1037, 45 S.L.R. 863; and the Education of Blind and Deaf-Mute Children (Scotland) Act 1890 (53 and 54 Vict. cap. 43), sec. 3, were referred to.

LORD JUSTICE-CLERK—The pursuer in this case is the father of a blind boy aged seven at the time of the accident in question, and he had taken advantage of the Statute of 1890 to send his son to the hostel and the school provided by the Education Authority of Glasgow for the education and maintenance of blind children. The statute applies in terms only to the case of parents who are not able financially to provide education and maintenance otherwise. But the pursuer himself, in his statement in answer to the averment that he "pleaded inability from poverty to pay for the education and maintenance of the said Donald Gow, and made application to the defenders to have the said child educated and maintained," says that that is incorrect. He denies that he made any application to the defenders on the ground of poverty or on any other ground. Whether this fact would make any material difference to the case was not argued, and I do not propose to deal further with it.

The issue proposed for the pursuer was in ordinary form—Whether on or about 22nd February 1921, and at or in Woodburn House, Rutherglen, the pursuer's pupil son Donald sustained personal injury through the fault of the defenders, to his loss, injury, and damage? The Lord Ordinary refused the issue and dismissed the action, holding that there were no averments relevant to support such an issue. I have come to be of opinion that the judgment of the Lord Ordinary was right.

Besides attending the school the boy was also for certain nights in the week resident at the hostel which the Education Authority had provided. With regard to that the pursuer says that it was arranged that the boy "should reside in Woodburn House, the hostel in question, for certain nights in each week, so that they might there supervise his care and safety in company with other children similarly afflicted." He further says that "during the said days of the week he was entirely in the charge of the defenders in the said hostel, where provision is made for inmates receiving board and attention suitable to their requirements." He also sets out that it has been "the practice for a few children not afflicted with blindness also to be permitted by the defenders to reside in the said hostel," and one can see many excellent reasons why the mixture of the children would be advantageous even to those who were suffering from blindness. Then in condescendence 3, where the accident is specifically referred to, the pursuer sets out that "during the evenings on which the said Donald Gow resided in the hostel it was the defenders' practice to allow boys and girls resident there to enjoy recreation in one of the rooms of the hostel," and that on one evening this boy "was engaged in playing games in the room above referred to along with other children, some of full sight." And the fault which he avers seems to be contained in this and the following statement to which I shall refer:—"On the said evening no servant of the defenders was left in charge of the said children." In condescendence 4 he sets out "that the said injuries were due to the fault of the defenders, who had caused the said Donald Gow to be removed from his home for the purpose of being properly tended and safeguarded in the manner most suitable for blind children. It was the duty of the defenders to have made suitable and sufficient provision for such safeguarding at all times of the day and night. It was further their duty to have provided a servant to supervise the conduct of the said children during their hours of play and recreation, and in particular on the occasion in question. This duty was all the more incumbent in respect that they permitted children not afflicted with blindness, and therefore more liable to boisterous games, to remain in the same room during play as those afflicted with blindness." But the only averment bearing upon the nature or the character of the act which brought about the accident is contained in this sentence—"At about 6·30 on the said evening another boy named Alexander Smith jumped unexpectedly on the back of the said Donald Gow, causing him to fall to the ground, and he sustained serious injuries as after mentioned."

In my judgment I do not think the obligation put upon the Education Authority can possibly be placed as high as the pursuer, in argument at anyrate, maintained, viz., an obligation on the part of the Education Authority to safeguard, as if they were to warrant that nothing should happen that would be injurious to the blind children there. The fact was that there was a recreation room set apart in the hostel where the children were allowed to play together in the evenings. As the pursuer puts it, they "allowed boys and girls resident in the hostel to enjoy recreation in one of the rooms of the hostel." That, it seems to me, was a quite reasonable provision for furthering the welfare of the children.

The fact that at the actual time of the accident there was "no servant of the defenders left in charge of the said children" is the sole ground of fault alleged. It is not said—and indeed the contrary appears—that there were not an ample number of attendants provided for the hostel, but there was not one at the time in the room actually in charge of the said children. The pursuer says that the children ought not to have been left without supervision. But then he goes on to say—"Had the defenders provided a servant or servants to watch over the conduct of the children in the said room on the said occasion, the said Donald Gow would not have sustained the forementioned injuries, as such servant would have been able to control the children and prevent interference of one with another, and for their fault and negligence in not making such provision, or alternatively for that of those whom they have placed in the said hostel as superintendents in not making such provision, the defenders are responsible." It seems to me that that would be putting an impossible burden upon the Education Authority, because it would came to this, that the Education Authority would practically have to warrant the safety of the children against all accidents however free from personal blame the officials of the hostel might be. There is nothing alleged against the boy Alexander Smith, who was the cause of the unfortunate occurrence, further than that it was his jumping unexpectedly on to the back of Donald Gow that caused the latter to fall to the ground and suffer the injuries which ultimately led to this action.

There is nothing said about the hostel being under-staffed, but only that at the time in question there was not actually in the play-room some servant who was to watch over the conduct of the children and safeguard them so as to ensure that no misfortune would happen to them. Strictly speaking, it is not legitimate to refer to the defenders' statement on a question of relevancy, but one may do so by way of illustration. One of the matrons, or one of her assistants, was moving about the rooms from time to time where the children were playing, taking a general supervision of what was going on. Therefore it was not a case where the children were put into the room, the door locked, and they were left alone. There was a general supervision being kept over them. What actually occurred was an unexpected, an unforeseen, and I think an almost unforeseeable misfortune, and even if there had been some matron or other servant actually in the room where the children were playing I do not see how that would have prevented the accident. The occurrence is described as one boy jumping unexpectedly on the back of the boy who was injured. It was the thing of a moment. There was no prolonged struggle or fight or contest which could have been stopped by a servant or person in authority actually in the room. If there had been a struggle or fight going on for some time one could have understood that there might have been room for complaint. But here was a boy who is not said to have been animated by ill-feeling towards the youngster who met with the accident. They were just playing as children will, and blame can hardly be attributed to him who caused the unfortunate results which happened. I do not think, moreover, that Gow's unfortunate affliction of blindness had any material bearing on the accident.

I think the case fails because the obligation which was sought to be imposed on the Education Authority was higher than the law imposes upon it, and also because I do not think that the fault which is alleged was a fault that conduced to the accident or that the provisions which the pursuer says the defenders should have made by providing a servant or servants to watch over the conduct of the children would have succeeded in preventing this unfortunate accident.

I am therefore of opinion that the Lord Ordinary reached the right conclusion that this record discloses no ground for a claim against the Education Authority, and that the action was rightly dismissed.

LORD ORMIDALE—It is not disputed by the defenders that they are charged with the duty of supervising the children committed to their care, but they maintain that the averments of the pursuer are not relevant to infer that the injuries received by the pursuer's son were due to any neglect of this duty. In my opinion this contention is sound. The averments in condescendence 4 are much too general to warrant the inference that the defenders were negligent in leaving the children unattended in the recreation-room. The pursuer does not aver that there was anything rough or violent in the games being played by the children, or that the boy who jumped on the back of Donald Gow was known to the defenders to be of a rough or mischievous nature. The conditions of the play-room were not in any way abnormal, and there was nothing to indicate that anything untoward was likely to happen in the course of the children's play. The accident might just as easily have happened to a boy not afflicted with blindness. Moreover, I agree with the Lord Ordinary that for all that is said about the incident the presence in the room of an adult would not have prevented the pursuer's son receiving the injuries he did.

LORD SANDS—In this case it appears that the pursuer's son, who was blind, was playing in a room with a few other children, some of whom had sight. I say a few, because if it were any part of pursuer's case that there was a large number—a roomful—of children he ought to have averred it. A boy jumped upon the back of pursuer's son. It is not said that this was done maliciously or otherwise than playfully. Pursuer's son fell and unfortunately he broke his arm. This was an odd mischance, for the limbs of boys are wonderfully elastic, and romping very rarely ends in serious injury. The pursuer attributed the accident to the fact that there was no adult in the room looking after the boys. He says

that there was nobody in charge of the boys, but it was made clear that this only means that there was nobody actually in the room at the moment. It does not mean that there was nobody on the premises responsible for the boys, aware that they were playing in this room, and available in case of any disturbance. The case would have presented a different aspect if the accident had been one which might have been foreseen as not unlikely to occur—if, for example, blind boys had been left to romp by themselves in a room where there was an unguarded fire and one of them had run into it and been burned. Pursuer's case is much short of that. It seems to require that in order to guard against any such unusual misadventure as here occurred there must be some adult in the room with attention concentrated upon the romping children. A lady sitting there sewing or knitting or reading a book would hardly have sufficed to safeguard against such a mishap. It appears to me that this is too exacting a requirement, and that a jury could not reasonably hold that the defenders were guilty of negligence in not making such provision. The children were not in my view exposed to any danger other than such as is inevitable if children are to be allowed to play together. It is not said that the children were unruly or quarrelsome. I do not think a reasonable parent would have had any anxiety in leaving them playing together, and I do not think that any higher standard of precaution is incumbent upon the defenders than would be observed by a reasonable parent. I am accordingly of opinion that the reclaiming note ought to be refused.

The Court adhered.

Counsel for Reclaimer (Pursuer)—Watt, K.C. — Crawford. Agents — Manson & Turner Macfarlane, W.S.

Counsel for Respondents (Defenders) — D. P. Fleming, K.C. — Berry. Agents — Laing & Motherwell, W.S.

Thursday, February 16.

SECOND DIVISION.

[Sheriff Court at Stranraer.

PIRRIE AND ANOTHER *v.* M'NEIL.

Process—Sheriff—Joint Motion for Proof—Remit to Court of Session for Jury Trial—Competency—Bar—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

In an action of damages for personal injuries brought in the Sheriff Court the Sheriff-Substitute "on the motion of parties' procurators" allowed a proof. The pursuers subsequently required the cause to be remitted to the Court of Session for jury trial. A question having been raised by the Clerk of Court as to the competency of the remit in view of the joint motion for proof in the Sheriff Court, the Court *allowed* an issue.

Archibald Gillies Pirrie and Mrs Elizabeth Reynolds or Pirrie, his wife, *pursuers*, brought an action of damages for personal injuries in the Sheriff Court at Stranraer against John M'Neil, farmer, Kirkcolm, Wigtown, *defender*.

On 19th January 1922 the Sheriff-Substitute (WATSON) pronounced the following interlocutor — "On the motion of parties' procurators, allows to the parties a proof of their respective averments."

The pursuers thereafter required the cause to be remitted to the Court of Session for jury trial. On the case appearing in the Single Bills counsel for the pursuers moved the Court to approve of an issue for the trial of the cause. The Clerk of Court called their Lordships' attention to the terms of the interlocutor of 19th January 1922 as inferring a joint agreement to refer the cause to proof, and therefore barring the pursuers from applying to the Court of Session for jury trial.

Counsel for the defenders intimated that he did not oppose the motion for an issue, and referred to the following authorities:— *Paterson* v. *Kidd's Trustee*, 1896, 23 R. 737, 33 S.L.R. 568; *Fleming* v. *Eadie*, 1897, 25 R. 3, 35 S.L.R. 1; Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30.

The Court (LORD JUSTICE-CLERK, LORD SALVESEN, and LORD ORMIDALE) allowed an issue.

Counsel for Pursuers and Appellants — Grainger Stewart. Agents — Simpson & Marwick, W.S.

Counsel for Defender and Respondent— Patrick. Agents—Armstrong & Hay, S.S.C.

HOUSE OF LORDS.

Thursday, February 23.

(Before Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury, and Lord Carson.)

GLENBOIG UNION FIRECLAY COMPANY *v.* INLAND REVENUE.

(In the Court of Session, February 5, 1921, S.C. 400, 58 S.L.R. 376.)

Revenue — Excess Profits Duty—Profits of Trade—Capital or Income—Compensation Paid by Railway Company in respect of Minerals Left Unworked—Finance (No. 2) *Act* 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40 (1) (2), *and Schedule IV, Part I, par.* 1, *Part II, par.* 1.

In 1913, one of the two pre-war trade years, payment was made to the Glenboig Union Fireclay Company of £15,316, 11s. 4d. by a railway company as compensation in terms of the Railways Clauses Act 1845 for minerals left unworked for support of their line. The sum was entered in the revenue account of the Glenboig Company for the year in which it was paid, and on it the company paid income tax. A question